(6) That it should therefore be understood that the police must not in any way delay or obstruct such interviews on arbitrary or fanciful grounds with a view to deprive the accused of his fundamental right.

No order.

Solicitors: *Karpal Singh, Wong & Co.*

L. SDN. BERHAD v. COMPTROLLER GENERAL OF INLAND REVENUE

[F.E. (Azmi L.P., Ismail Khan C.J. (Borneo) and Ali F.J.) September 21, 1972]

[Kota Kinabalu — Federal Court Civil Appeal No. 93 of 1971]

Income Tax — Deductions — Devaluation — Whether depreciation or fall in the value of money an allowable deduction — Onus — Income Tax Act, 1967, ss. 33 and 34.

In this case the taxpayer claimed a deduction for loss on sterling devaluation. This was disallowed by the Special Commissioners and the taxpayer's appeal to the High Court was dismissed. He thereupon appealed to the Federal Court.

Held: the taxpayer's case could not come within any of the provisions of sections 33 and 44 of the Income Tax Act, 1967 and as the taxpayer has failed to prove that the assessment was excessive the appeal must be dismissed.

Cases referred to:-

(1) *Charles Moore & Co. (W.A.) Pty. Ltd.* v. *F.C.T.* 95 C.L.R. 344.

(2) *Radio Paitress Ltd.* v. *Commissioners of Inland Revenue* 22 T.C. 106.

(3) *Texas Company (Australasia) Ltd.* v. *F.C.T.* 63 C.L.R. 382.

(4) *Davies* v. *Shell Company of Chin Ltd.* 32 T.C. 133.

FEDERAL COURT.

S. Woodhull (*Alex Khoo* with him) for the appellants.

Nik Saghir bin Mohamad Noor (Senior Federal Counsel) for the respondent.

Ali F.J.: This is a dispute between a taxpayer, L. Sdn. Berhad and the Inland Revenue Department over income tax assessment. In the usual course of events the dispute came before the Special Commissioners by way of an appeal from the taxpayer on the ground that the assessment was excessive. The Special Commissioners dismissed the appeal and confirmed the assessment. The question before the Special Commissioners, which I think has not been considered before is this: Is a depreciation or fall in the value of money an allowable deduction under the Income Tax Act, 1967?

The facts, not in dispute, are as follows: The taxpayer company was incorporated in Sabah in East Malaysia sometime in April 1964. In accordance with the object of its association, the company carried on business of buying lands from the North Borneo Timbers Ltd. in exchange for issue of shares by the company and selling them to others. For reasons of its own, the company remitted part of the proceeds of sales to England where it was held in deposit and current accounts in banks in London. The amount remitted, expressed in sterling, was £480,282. 12sh. 0d. The company was assessed to income tax for the accounting period from June 1, 1967 to May 31, 1968.

When sterling was devalued sometime in November, 1967, the taxpayer's money in London depreciated in value. The extent of the depreciation, expressed in Malaysian dollars, was $595,840, which appears in the company's profit and loss account for the year ending May 31, 1968 as an item of expenses described as "Loss on Sterling Devaluation". Maintaining that this was an allowable deduction, the taxpayer objected to the tax assessment.

The taxpayer's appeal to the Special Commissioners as already stated was dismissed. The Special Commissioners held that in the circumstances of this case the loss was not an allowable deduction under the Income Tax Act, 1967. A further appeal to the High Court at Kota Kinabalu met with the same result. Hence this appeal.

The taxpayer sought to bring its case within the Income Tax Act, 1967 by relying, mainly, on cases decided in Australia and in England. In their grounds of decision in Annexure 'D' to the case stated for the opinion of the High Court the Special Commissioners pertinently pointed out that the taxpayer did not seem to rely on any specific provision of the Act. Needless to say that the dispute in this appeal necessarily falls to be governed by the Act. The Special Commissioners, however, considered sections 33 and 44 of the Act and were satisfied that the taxpayer's case could not come within any of those provisions. I incline to the same view. A number of cases were also considered by the Special Commissioners who distinguished them. In particular, they considered *Charles Moore & Co. (W.A.) Pty. Ltd.* v. *Federal Commissioner of Taxation*[1] *Radio Pictures Limited* v. *Commissioners of Inland Revenue*[2] and *Texas Company (Australasia) Limited* v. *Federal Commissioner of Taxation.*[3] In the final analysis they concluded that the taxpayer failed to discharge the onus of proof as laid down in paragraph 13 Schedule 5 to the Income Tax Act.

One of the major questions which arose before the Special Commissioners was whether the taxpayer's money in London was fixed capital or circulating capital. It seems agreed that in the light of decided cases if the money in London was circulating capital the loss would be an allowable deduction. It would be otherwise if it was fixed capital. I find it necessary to observe that the expression "fixed capital" or "circulating capital" is nowhere used in the Income Tax Act, 1967. In terms of section 4 of that Act, gains or profits are chargeable income. The mode of ascertaining chargeable income is set out in section 5. I do not propose to consider any of these provisions in extenso except to say that one way of ascertaining chargeable income is to find out adjusted income as provided in section 33, or adjusted loss as provided in section 40 of the Act. Quite plainly, I think the taxpayer would not find it easy to bring its case within any of these provisions. Hence the contention that the money was circulating capital. The Inland Revenue

on the other hand maintained that it was fixed capital. For the meanings of these expressions, I find it convenient to refer to the judgment of Jenkins L.J. in *Davies* v. *Shell Company of China Ltd.*[4] On page 154 he said:

"... inasmuch as 'circulating capital' simply means capital employed in the trading operations of the business and the dealings with it comprise trade receipts and trade disbursements, while 'fixed capital' simply means capital not so employed in the business, though it may be used for the purposes of the business, as a factory is used for the purposes of a manufacturing business, but does not constitute capital employed in the trading operations of the business."

It is implicit from these words that the manner in which capital is employed is a material factor in determining whether it is fixed or circulating capital. In this case it does not seem to be part of the taxpayer's case that the money in London has been employed in any manner for the company's business which, of course, was buying and selling lands in Sabah. As already stated lands were purchased by the taxpayer in exchange for the issue of shares by the company. That was in accordance with the object of association before it was altered in 1969. As to the reason why part of the proceeds of sales was sent to England as was done in this case, I do not think it is necessary to enquire into it. The fact that this money has never been employed for the taxplayer's business during the accounting period is enough to make me say that it was irrelevant to consider whether it was circulating or fixed capital. In fairness to the taxpayer I shall consider briefly some of the cases which have been relied upon as supporting its contention. In the first case of *Charles Moore & Co. (W.A.) Pty.* v. *Federal Commissioner of Taxation, supra,* there was actual loss of cash or money by robbery while being taken to the bank to be deposited in the usual way. The main question which had to be considered was whether the sending of the daily takings of the departmental store to the bank was part of its trading operations within the meaning of the words "loss incurred in gaining or producing assessable income" in section 51(1) of the Australian Act 1936-52. The Australian High Court giving an affirmative answer held that the loss was an allowable deduction. We are not here concerned with loss of cash but with a fall in the value of money. So there is nothing in that case which can assist the taxpayer.

The cases of *Radio Pictures Limited* v. *Commissioners of Inland Revenue, supra,* and *Texas Company (Australasia) Ltd.* v. *Federal Commissioner of Taxation, supra,* can be considered together. The loss in each case was loss on the exchange by which is meant that owing to the fall in the value of money in the taxpayer's country, the taxpayer had to provide more local money in order to pay their foreign debts. In the case of *Radio Pictures Ltd.* the primary question was whether the taxpayer's obligation to pay its debts was a dollar or sterling obligation. On the evidence in that case it was held that the obligation wast a dollar obligation. The extra money in local currency required to pay the debt on exchange was, therefore, an allowable deduction. A similar situation arose in the case of *Texas Company (Australasia) Ltd.* v. *Federal Commissioner of Taxation, supra.* Turning to the instant case it is difficult to conceive how the taxpayer can be said to have suffered any loss on the exchange inasmuch as there was no foreign debt which had to be paid. What the taxpayer conceived as loss was nothing more than a notional loss. If this is an allowable deduction, a rise in the value of the money in London would by the same token be chargeable income under section 4 of the Act which, however, applies only to gains or profits from a business. Another case of some importance was referred to in the judgment of the learned High Court judge. This is the case of *Davies* v. *Shell Company of China, supra.* In this case the taxpayer was assessed to income tax on profits made on the exchange owing to the fall in the value of Chinese dollars. The taxpayer's liability to repay their agents' deposits in Chinese dollars was reduced to such an extent that they had to acquire less local currency in order to repay their agents. The question which arose was whether the agents' deposits had been employed by the taxpayer as fixed or circulating capital. On the evidence it was found to be fixed capital and the profits were therefore held not assessable income. In the instant case the money in London belonged to the taxpayer and not to any third party as in the *Davies's* case. There can be no question of any debt to be paid so as to give rise to a loss on the exchange. The assertion by the taxpayer that the money could be used at any time if needed for the company's business is neither here nor there. I venture to think that the taxpayer has not suffered any loss known to law. The purchasing power of money in London may not be as strong as before the devalution of sterling in November, 1967. But that is no reason for saying that there has been a loss of money or cash. I would uphold the finding of the Special Commissioners as well as of the High Court that in terms of paragraph 13 of Schedule 5 to the Income Tax Act 1967 the taxpayer fails to prove that the assessment is excessive.

There is one other point which can be disposed of in a few words. This relates to the complaint that the Special Commissioners have drawn wrong inferences from the primary facts. If, as already stated that the taxpayer has failed to discharge the onus of proof, it matters little whether or not the Special Commissioners have made wrong inferences from available facts. I shall be content to say I agree with the learned High Court judge that there is neither substance nor merit in the complaint.

Accordingly, I would dismiss the appeal with costs.

Azmi L.P. and **Ismail Khan C.J. (Borneo)** concurred.

Appeal dismissed.